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No. 91-1849

Supreme Court, U.S.

FILED

JUL 23 1992

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In the Supreme Court of the United States

OCTOBER TERM, 1992

MANUEL COSTA, PETITIONER

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT***

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly sentenced petitioner to a 20-year minimum term under former 18 U.S.C. 4205 (1982), which was repealed as of November 1, 1987.

2. Whether the court of appeals should have conducted a *de novo* review of the trial court's decision that the probative value of a proffered witness's testimony was outweighed by its tendency to cause confusion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-38) is reported at 947 F.2d 919.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1991. A petition for rehearing was denied on January 27, 1992. Pet. App. 39-40. The petition for a writ of certiorari was filed on April 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to import more than one kilogram of cocaine, in violation of 21 U.S.C. 963 (Count 1); conspiring to possess more than one kilogram of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846 (Count 2); and importing more than one kilogram of cocaine, in violation of 21 U.S.C. 952(a) (Counts 4, 5, 7, and 9). The district court sentenced petitioner to concurrent 20-year terms of imprisonment on Counts 1 and 2, and to four consecutive ten-year terms of imprisonment on Counts 4, 5, 7, and 9. In addition, pursuant to 18 U.S.C. 4205 (1982), the court ordered that petitioner would not be eligible for parole until he had served 20 years of his 60-year sentence. The court of appeals affirmed. Pet. App. 2-38.

1. Between January and June of 1985, petitioner and several co-conspirators were involved in importing cocaine into the United States from the Bahamas. Over a period of approximately six months, various members of the conspiracy made four trips to the Bahamas. They picked up cocaine that had been flown to the Bahamas from Colombia, loaded the cocaine aboard boats, and returned to south Florida. Other members of the conspiracy assisted in offloading the cocaine once it arrived in the United States, guarding the loads, and carrying the cocaine to its final destination. The conspirators imported more than 1,800 kilograms of cocaine in that manner. Pet. App. 3-4; Gov't C.A. Br. 4.

2. a. At trial, petitioner's co-defendant, Rene Nunez, proffered the testimony of Roger Furbee. Outside the presence of the jury, Furbee testified that he

did not know petitioner, Nunez, or co-defendant Debra Perry, and that he had not been involved in a drug importation conspiracy or any drug trafficking incidents with them. However, Furbee said that in early 1985 he had been involved in importing shipments of cocaine with three of petitioner's co-conspirators, each of whom testified as a government witness. Furbee also testified that he was prepared to help offload the June 1985 shipment of cocaine that was intercepted by the Customs Service. Gov't C.A. Br. 15-16; Pet. C.A. Br. 6; Pet. App. 8.

The district court sustained the government's objections to Furbee's testimony about the first three shipments, under Fed. R. Evid. 608(b) and 403.¹ The court found that "the probative value [of the proffered testimony] is substantially outweighed by the danger of unfair prejudice and confusion of the issues." 31 R. 120. It precluded Furbee's testimony about the first three shipments under Rule 403 because, the court concluded, that testimony related to a different conspiracy than the one alleged in the indictment and would therefore tend to confuse the jury. The district court based its finding that the conspiracies were unrelated on Furbee's inability to recall certain details about the boats used to import the cocaine, and on differences between Furbee's recollection of the importation operations and the descriptions provided by other conspirators. The court also concluded that the defense was attempting to impeach the general

¹ Rule 608(b) prohibits the impeachment of a witness through extrinsic evidence, other than convictions, showing specific instances of misconduct. Rule 403 requires the exclusion of relevant evidence if its probative value is "substantially outweighed" by the evidence's tendency to cause undue prejudice or confusion.

credibility of the government witnesses with extrinsic evidence of specific misconduct unrelated to the conspiracy at issue in petitioner's trial, in violation of Rule 608(b). See Pet. App. 9-11. Although the district court was prepared to allow Furbee to testify about the June 1985 shipment, counsel for co-defendant Nunez stated that he would not call Furbee as a witness because he could not elicit meaningful testimony from him. Gov't C.A. Br. 17-18.

b. After imposing on petitioner a total sentence of 60 years' imprisonment, the district court stated: "Pursuant to 18 USC Section 4205(a) and 4205(b)(1) the Court noting the amount of cocaine brought into this country by [petitioner], the Court finds that the ends of justice and best interest of the public require that * * * [petitioner] shall not be eligible for parole until serving one third of the 60 years or 20 years." Pet. App. 42.

3. The court of appeals affirmed. Pet. App. 2-38.

a. The court acknowledged that it was "concerned" by the district court's exclusion of Furbee's testimony under Fed. R. Evid. 403. Pet. App. 11-12. In the court's view, the better practice in most circumstances is to admit evidence arguably relevant to a charged conspiracy and allow the jury to determine whether the evidence relates to the conspiracy alleged in the indictment. *Id.* at 13-17, relying on *United States v. Gonzalez*, 940 F.2d 1413, 1422 & n.17 (11th Cir. 1991), cert. denied, 112 S. Ct. 910 (1992). Thus, the court explained that if it were conducting a *de novo* review, it "would probably [have] admit[ted] all of Furbee's proffered testimony," Pet. App. 16, because the fact that he played a role in importing drugs with some of the conspirators, but claimed not to know petitioner, supported petitioner's claim of innocence. But the court of appeals was unwilling to conclude that the

district court had abused its discretion in excluding Furbee's testimony under Rule 403. Pet. App. 18. The court of appeals noted that the district court, which "was in the best position to make the credibility determination" necessary in a Rule 403 analysis, doubted Furbee's veracity and considered Furbee's recollection of details to be so poor that there were substantial doubts about its relevance to the charged offense. Pet. App. 18-19 & n.8.²

b. Petitioner had objected to the district court's order that he serve at least one-third of his sentence before becoming eligible for parole. See Pet. C.A. Br. 43-45. Relying on *United States v. Berry*, 839 F.2d 1487, 1488-1489 (11th Cir. 1988), cert. denied, 488 U.S. 1040 (1989), the court of appeals found that argument to be without merit. Pet. App. 33-34.

ARGUMENT

1. Petitioner first contends, Pet. 14-26, that the district court lacked authority to postpone his parole eligibility until he had served 20 years of his sentence.

² The court of appeals reached a different conclusion with respect to the district court's reliance on Rule 608(b) as an additional ground for exclusion of Furbee's testimony. Pet. App. 20-22. Explaining that "[a] trial judge's discretion 'does not extend to the exclusion of crucial relevant evidence establishing a valid defense,'" *id.* at 20, quoting *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. 1981), and that Furbee's proffered evidence, even if extrinsic, "was directly relevant to the material issue of the appellants' alleged participation in the smuggling operations," the court determined that Furbee's testimony was not "mere character evidence," and should not have been excluded under Rule 608(b). Pet. App. 21-22. The court concluded, however, that the failure of the proffered testimony to survive the district court's balancing test under Rule 403 sufficiently justified its exclusion from evidence. Pet. App. 23.

He relies on former 18 U.S.C. 4205(a), which provided that a prisoner ordinarily would be eligible for parole after serving ten years of a sentence of more than 30 years' imprisonment.³ Although former Section 4205(b)(1) authorized a district judge to order the postponement of a prisoner's sentence,⁴ petitioner contends that the period of ineligibility may not exceed ten years.

Petitioner correctly notes that there is a conflict on this issue among the circuits. Some courts—including the court of appeals in this case—have relied on Section 4205(b)(1) as authorizing the imposition of a minimum term of up to one-third of the sentence imposed, even if that minimum term exceeds ten years. See *United States v. Varca*, 896 F.2d 900, 905-906 (5th Cir.), cert. denied, 111 S. Ct. 209 (1990); *United States v. Parker*, 881 F.2d 945 (10th Cir. 1989), cert. denied, 493 U.S. 1082 (1990); *United States v. Berry*, 839 F.2d 1487 (11th Cir. 1988), cert. denied, 488 U.S. 1040 (1989);

³ Former Section 4205(a) provided:

Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

⁴ Former Section 4205(b) provided:

Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court * * *.

United States v. Gwaltney, 790 F.2d 1378, 1387-1389 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb v. United States*, 789 F.2d 647, 652 (8th Cir. 1986); *United States v. O'Driscoll*, 761 F.2d 589, 595-597 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Other courts have held that Section 4205(a) overrode Section 4205(b) and limited the no-parole period to ten years, rather than one-third of the sentence that the court imposed. See *United States v. Hagen*, 869 F.2d 277, 280-281 (6th Cir.), cert. denied, 492 U.S. 911 (1989); *United States v. DiPasquale*, 859 F.2d 9, 13 (3d Cir. 1988); *United States v. Castonguay*, 843 F.2d 51, 52-56 (1st Cir. 1988); *United States v. Fountain*, 840 F.2d 509, 517-523 (7th Cir.), cert. denied, 488 U.S. 982 (1988).

Despite the conflict in the circuits, this issue does not warrant review by this Court, because it is of no continuing importance. Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 218(a)(5), 235, 98 Stat. 2027, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728. The Sentencing Reform Act abolished parole, instituting in its place a system of determinate sentencing. Thus, the statutory construction issue presented by petitioner, which this Court has declined to review in the past,⁵ affects only the rapidly diminishing set of cases involving prosecutions for criminal conduct completed before November 1, 1987.

⁵ See, e.g., *Varca v. United States*, 111 S. Ct. 209 (1990); *Parker v. United States*, 493 U.S. 1082 (1990); *Garcia v. United States*, 493 U.S. 963 (1989); *Whitworth v. United States*, 489 U.S. 1084 (1989); *Berry v. United States*, 488 U.S. 1040 (1989); *Gwaltney v. United States*, 479 U.S. 1104 (1987); *O'Driscoll v. United States*, 475 U.S. 1020 (1986).

2. Petitioner also contends, Pet. 27-36, that the court of appeals improperly used the "abuse of discretion" standard to review the district court's decision to exclude Roger Furbee's testimony, and instead should have subjected that decision to *de novo* review. That contention is without merit.

Petitioner concedes, Pet. 34, that in reviewing a trial court's rulings under Fed. R. Evid. 403, appellate courts are generally required to determine whether the lower court abused its discretion in a way that resulted in substantial prejudice to a defendant's rights. See *United States v. Shirley*, 884 F.2d 1130, 1132 (9th Cir. 1989); *United States v. Turk*, 722 F.2d 1439, 1441 (9th Cir. 1983), cert. denied, 469 U.S. 818 (1984); *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983); *United States v. Beechum*, 582 F.2d 898, 913-915 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). In this case, the application of the abuse of discretion standard was entirely proper. As the court of appeals pointed out, Pet. App. 18-19 & n.8, the district court heard Furbee's testimony and was clearly in the best position to determine his credibility and the relevance of his testimony. See, e.g., *United States v. Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985) ("[c]redibility choices are for the trial, not the appellate court"); see also *United States v. Cintolo*, 818 F.2d 980, 998 (1st Cir.) (trial court has "front row seat" and "unique vantage point" from which to make Rule 403 judgments), cert. denied, 484 U.S. 913 (1987).

As the court of appeals also noted, Pet. App. 19 n.8, the district court doubted the witness's veracity, see *United States v. Suggs*, 755 F.2d at 1542, and concluded that the witness's recollections of the details of the conspiracy in which he allegedly participated were so poor as to create substantial doubt that his testimony related "in any way" to the conspiracy charged in the

indictment. See *United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.) (trial court in superior position to evaluate likely impact of evidence under Rule 403), cert. denied, 474 U.S. 923 (1985); see also *United States v. Terebecki*, 692 F.2d 1345, 1350 (11th Cir. 1982) (evidence of another transaction properly excluded where evidence did not have relevance asserted by defendant); *United States v. Lyles*, 593 F.2d 182, 194-196 (2d Cir.) (proof of separate conspiracy not charged in indictment carried with it "serious potential for prejudice in the form of confusion of issues"), cert. denied, 440 U.S. 972 (1979).

The court of appeals correctly observed, Pet. App. 19 n.8, that these findings were "essentially factual," subject to review only for clear error, and that they sufficed to justify the exclusion of Furbee's testimony under Rule 403. See *Murray v. United States*, 487 U.S. 533, 543 (1988) ("it is the function of the District Court rather than the Court of Appeals to determine the facts"); *United States v. Gutierrez*, 931 F.2d 1482, 1491 (11th Cir.) (district court's findings of fact will be sustained unless clearly erroneous), cert. denied, 112 S. Ct. 321 (1991).⁶

⁶ As noted above, the district court's decision to exclude Furbee's testimony was ultimately based on its *factual* determinations about the witness's veracity and the accuracy of his recollections. See, e.g., *Murray v. United States*, 487 U.S. at 543 (function of district court, rather than court of appeals, is to determine facts). Accordingly, petitioner errs when he attempts, see Pet. 32-35, to characterize the court of appeals' decision as conflicting with other decisions holding that legal errors are subject to *de novo* review. See *United States v. Abayomi*, 820 F.2d 902, 908-909 (7th Cir.) (rejecting attempt to recharacterize evidentiary decision as constitutional issue and thus avoid review under abuse of discretion standard), cert. denied, 484 U.S. 866 (1987).

In addition, although the court of appeals might have reached a different conclusion than the district court about the admissibility of Furbee's testimony, see Pet. App. 16, that circumstance, as the court of appeals itself recognized, *id.* at 18, does not show that the district court abused its discretion in excluding the testimony. See, e.g., *Crawford v. Edmonson*, 764 F.2d 479, 485 (7th Cir.), cert. denied, 474 U.S. 905 (1985); *United States v. Brannon*, 616 F.2d 413, 418 (9th Cir.), cert. denied, 447 U.S. 908 (1980).

Petitioner's final argument, that the district court's exclusion of Furbee's testimony deprived him of his Sixth Amendment right to present witnesses in his own defense, Pet. 35-36, is plainly meritless. A defendant's right to present evidence is not absolute. *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984). In the exercise of that right, a defendant must comply with established rules of procedure and evidence designed to assure fairness and reliability in the ascertainment of guilt and innocence. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (right to confront witnesses). A trial judge has "wide latitude" to exclude evidence that is "marginally relevant" or poses an undue risk of "confusion of the issues." *Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). A trial court's reasonable exercise of its discretion to conclude that the relevance of proffered testimony is substantially outweighed by its potential to cause confusion presents no constitutional issue.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1992